

March 3, 2004

Honorable Jackie Speier  
2032 State Capitol

**STATE EMPLOYER-EMPLOYEE RELATIONS - #5943**

Dear Senator Speier:

You have asked whether the parties to the memorandum of understanding between the state employer and State Bargaining Unit 6 that was approved by Senate Bill No. 65 of the 2001-02 Regular Session (Ch. 1, Stats. 2002) would be required to renegotiate the affected provisions that require the expenditure of funds if the Legislature does not provide sufficient funding to implement those provisions in the Budget Act of 2004 or other legislation.

The Ralph C. Dills Act (Ch. 10.3 (commencing with Sec. 3512), Div. 4, Title 1, Gov. C.; <sup>1</sup> hereafter the Dills Act) contains collective bargaining provisions covering specified state employees. Section 3517 requires the Governor or his or her representative to meet and confer in good faith regarding wages, hours, and other terms or conditions of employment with representatives of recognized employee organizations. That section also provides that the process should include adequate time prior to the adoption by the state of its final budget for the ensuing year for the

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<sup>1</sup> All further section references are to the Government Code, unless otherwise indicated.

resolution of impasses.<sup>2</sup> Section 3517.5 requires that when agreement is reached between the Governor and the recognized employee organization, they jointly prepare a written memorandum of understanding to be presented to the Legislature in appropriate cases. These instances include situations in which the memorandum of understanding (hereafter MOU) contains provisions that require the expenditure of funds or that require legislative action because of statutory conflicts in order to permit their implementation (Sec. 3517.6). Section 3517.6 provides that if specific code sections are in conflict with an MOU, the MOU prevails over the code section without further legislative action (see also paras. (2), (3), and (4), subd. (a), Sec. 3517.6, and Sec. 3517.61, which apply only to specific state bargaining units). With respect to the expenditure of funds, subdivision (b) of Section 3517.6 reads as follows:

"3517.6. . . .

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"(b) In any case where the provisions of Section 19997.2, 19997.3, 19997.8, 19997.9, 19997.10, 19997.11, 19997.12, 19997.13, or 19997.14 are in conflict with the provisions of a memorandum of understanding, the terms of the

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<sup>2</sup> According to administrative rulings, language in Section 3517 that requires state and employee representatives to "endeavor to reach agreement on matters within the scope of representation prior to the adoption by the state of its final budget for the ensuing year" merely uses the budget as a "point of reference," is only "hortatory," and does not bind the negotiation process to the timeliness imposed for adoption of the state budget (*Association of California State Attorneys and Administrative Law Judges (ACSA) v. State of California, Department of Personnel Administration* (1990) 14 PERC 21134; *Association of California State Attorneys and Administrative Law Judges (ACSA) v. State of California (Department of Personnel Administration)* (1986) 10 PERC 17089, citing *Dublin Professional Fire Fighters v. Valley Community Services District* (1975) 45 Cal.App.3d 116, 118).

memorandum of understanding shall be controlling unless the State Personnel Board finds those terms to be inconsistent with merit employment principles as provided for by Article VII of the California Constitution. Where this finding is made, the provisions of the Government Code shall prevail until those affected sections of the memorandum of understanding are renegotiated to resolve the inconsistency. If any provision of the memorandum of understanding requires the expenditure of funds, those provisions of the memorandum of understanding shall not become effective unless approved by the Legislature in the annual Budget Act. If any provision of the memorandum of understanding requires legislative action to permit its implementation by amendment of any section not cited above, those provisions of the memorandum of understanding shall not become effective unless approved by the Legislature." (Emphasis added.)

Thus, subdivision (b) of Section 3517.6 specifies that if any provision of an MOU requires either the expenditure of funds or amendment of any code section not otherwise listed in the section, that provision does not become effective without legislative approval. Similar language appears in Section 3517.61, which applies only to State Bargaining Unit 6.

The requirements of legislative approval in subdivision (b) of Section 3517.6 and Section 3517.61 amount to a codification of what the California Constitution would otherwise require in order for a provision in an MOU to become effective if that provision involves the expenditure of funds or a change in statutory law. Specifically, money may be drawn from the State Treasury only through an appropriation made by law and upon the Controller's duly drawn warrant (Sec. 7, Art. XVI, Cal. Const.). Thus, a provision in an MOU that proposes spending for salaries or benefits could not become operative without an appropriation made by law to support a warrant for this purpose. Similarly, a statute prescribes laws that must be followed (see *Ex parte Shrader* (1867) 33 Cal. 279, 283), and a provision in an MOU that is predicated on the revision of a statute could not go into effect until the necessary changes in law are

made. In that regard, laws are made or revised by statute and statutes are enacted by bill (subd. (b), Sec. 8, Art. IV, Cal. Const.). Therefore, even in the absence of the qualifying language in subdivision (b) of Section 3517.6 and Section 3517.61, provisions of an MOU that require state expenditures or a change in existing law would not become effective without a statutory enactment.

Thus, subdivision (b) of Section 3517.6 and Section 3517.61 do not operate as a limitation on legislative authority with respect to an MOU, but instead state what would otherwise be the case under any circumstances. Moreover, because the act of one legislative body cannot limit or restrict its own authority or that of subsequent legislatures by enacting legislation (*City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 929; *In re Collie* (1952) 38 Cal.2d 396, 398; *County Mobilehome Positive Action Comm., Inc. v. County of San Diego* (1998) 62 Cal.App.4th 727, 734), neither subdivision (b) of Section 3517.6, Section 3517.61, nor any other statute could prevent a future Legislature from enacting legislation with respect to an MOU, as long as that legislation does not unconstitutionally impair vested contractual rights (see Sec. 9, Art. I, Cal. Const.).

Having determined the necessity for legislative approval with regard to specified provisions in an MOU between the state and represented employees, we turn to Section 3517.7, which reads as follows:

"3517.7. If the Legislature does not approve or fully fund any provision of the memorandum of understanding which requires the expenditure of funds, either party may reopen negotiations on all or part of the memorandum of understanding.

"Nothing herein shall prevent the parties from agreeing and effecting those provisions of the memorandum of understanding which have received legislative approval or those provisions which do not require legislative action."

Thus, Section 3517.7 makes a distinction between MOU provisions that require legislative approval and those that do not, and acknowledges that those provisions

that do not require legislative approval or have received it may be effected separately.

A recent illustration of legislative approval of an MOU is Senate Bill No. 65 of the 2001-02 Regular Session, which was enacted as Chapter 1 of the Statutes of 2002 (hereafter Chapter 1). Chapter 1 relates to the memorandum of understanding between the state and State Bargaining Unit 6, makes various statutory changes relating to state employee compensation, and makes an appropriation in augmentation of specified items of the Budget Act of 2001 for state employee compensation (Sec. 48, Ch. 1).

Chapter 1 also contains the following provisions relating to legislative approval of the MOU:<sup>3</sup>

"SECTION 1. The Legislature finds and declares that the purpose of this act is to adopt an agreement pursuant to Section 3517 of the Government Code entered into by the state employer and State Bargaining Unit 6, the California Correctional Peace Officers Association.

"SEC. 2. The provisions of the memorandum of understanding prepared pursuant to Section 3517.5 of the Government Code and entered into by the state employer and State Bargaining Unit 6, the California Correctional Peace Officers Association, and that require the expenditure of funds, are hereby approved for the purposes of Section 3517.6 of the Government Code.

"SEC. 3. The provisions of the memorandum of understanding approved by Section 2 of this act that are scheduled to take effect on or after July 1, 2001, and that require the expenditure of funds shall not take effect unless funds for these provisions are specifically appropriated by the Legislature. If funds for these provisions are not specifically appropriated by

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<sup>3</sup> See similar provisions, for example, in Senate Bill No. 728, as amended January 18, 2002, and Assembly Bill No. 606 of the 2001-02 Regular Session, which was enacted as Chapter 363 of the Statutes of 2001.

the Legislature, the state employer and the affected employee organization shall meet and confer to renegotiate the affected provisions.

"SEC. 4. Notwithstanding Section 3517.6 of the Government Code, the provisions of any memorandum of understanding that require the expenditure of funds shall become effective even if the provisions of the memorandum of understanding are approved by the Legislature in legislation other than the annual Budget Act.

\* \* \* (Emphasis

added.)

Also, pertinent in this regard is the Legislative Counsel's Digest<sup>4</sup> for Chapter 1, which reads, with respect to Sections 1 to 4, inclusive, as follows:

"(1) Existing law provides that if any provision of a memorandum of understanding reached between the state employer and a recognized employee organization representing state civil service employees requires the expenditure of funds, those provisions of the memorandum of understanding shall not become effective unless approved by the Legislature in the annual Budget Act.

"This bill would approve provisions that require the expenditure of funds of a memorandum of understanding entered into between the state employer and State Bargaining Unit 6 (California Correctional Peace Officers Association), and would provide that the provisions of any memorandum of understanding that require the expenditure of funds shall become effective even if the provisions of the memorandum of understanding are approved by the Legislature in legislation other than the annual Budget Act.

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<sup>4</sup> With respect to the Legislative Counsel's Digest, courts have indicated that it is reasonable to presume that the Legislature adopted an act with the intent and meaning expressed in the digest (*Pollack v. Department of Motor Vehicles* (1985) 38 Cal.3d 367, 376-377).

"This bill would also provide that provisions of the memorandum of understanding approved by this bill that require the expenditure of funds on or after July 1, 2001, may not take effect unless funds for these provisions are specifically appropriated by the Legislature, and would provide that if funds for these provisions are not specifically appropriated by the Legislature, the state employer and the affected employee organization shall meet and confer to renegotiate the affected provisions."

The two primary effects of Chapter 1 were to make the statutory changes needed to effect the MOU between the state employer and State Bargaining Unit 6 by amending, repealing, and adding various sections of the Government and Vehicle Codes and to make an appropriation in Section 48 of that chapter for those required expenditures, explicitly approving those expenditures in Sections 2 to 4, inclusive.

Except for Section 1 of Chapter 1, which states that the "Legislature finds and declares that the purposes of this act is to adopt an agreement ...," Chapter 1 and the Legislative Counsel's Digest consistently refer to the approval of the provisions of the MOU that require the expenditure of funds and not the entire MOU.

Thus, based on the language in Sections 3517.6 and 3517.7, and consistent with a typical bill that approves an MOU, such as Chapter 1, we conclude that, in general, in approving an MOU pursuant to the Dills Act, the Legislature is approving only those provisions of the MOU that require the expenditure of funds or the amendment, addition, or repeal of a code section, and not the other provisions in the MOU that are agreed to between the Governor and the recognized employee organization.

With regard to "expenditure of funds," as used in Section 3517.6, there is no definition of the term provided. Whether any particular provision of an MOU does or does not require an expenditure of funds must be decided on a case-by-case basis.

Clearly, provisions that require a specific appropriation in the Budget Act, such as salaries and wages and employee health benefits, require the expenditure of funds. On the other hand, where the

provision of an MOU does not require a specific appropriation in the Budget Act (as contrasted with Chapter 1), and any costs associated with the provision can be spread out over all departmental budgets and absorbed without specific itemization, arguably the Legislature has given its approval by adopting a Budget Act with sufficient funding for the proposed benefit. If the Legislature does not provide sufficient funding in the Budget Act, or if the Legislature specifically disapproves a provision in an MOU by control language in the Budget Act during any year in which the MOU is applicable, we think that action would be upheld as an exercise of the Legislature's specific approval authority pursuant to subdivision (b) of Section 3517.6 if it could be shown that the provision in question has specific costs associated with it.

Regarding, specifically, the expenditure of funds for purposes of Chapter 1, Section 48 of that chapter reads as follows:

"SEC. 48. The sum of fifteen million four hundred twenty-one thousand dollars (\$15,421,000) is hereby appropriated for expenditure in the 2001-02 fiscal year in augmentation of, and for the purpose of state employee compensation as provided in, Items 9800-001-0001, 9800-001-0494, and 9800-001-0988 of Section 2.00 of the Budget Act of 2001 (Chapter 106 of the Statutes of 2001), in accordance with the following schedule:

"(a) Fifteen million three hundred twenty-five thousand dollars (\$15,325,000) from the General Fund in augmentation of Item 9800-001-0001.

"(b) Sixty-one thousand dollars (\$61,000) from unallocated special funds in augmentation of Item 9800-001-0494.

"(c) Thirty-five thousand (\$35,000) from other unallocated nongovernmental cost funds in augmentation of Item 9800-001-0988."

Subsequently, in the Budget Acts of 2002 and 2003, the Legislature appropriated amounts to be allocated "by executive order by the Department of Finance" to the several state departments and other agencies "in



augmentation of their respective appropriations or allocations, in accordance with approved memoranda of understanding" without specifying what amount goes to any particular department or agency (Items 9800-001-0001, 9800-001-0494, and 9800-001-0988, Sec. 2.00, Budget Act of 2002 (Ch. 379, Stats. 2002, enacted September 5, 2002) and the same item numbers in Sec. 2.00, Budget Act of 2003 (Ch. 157, Stats. 2003, enacted August 2, 2003)).

Although those recent budget acts were not enacted until one or two months after the commencement of the fiscal year, neither Chapter 1 nor the Dills Act contains any provision that specifies how or when it is to be determined that the Legislature has not fully funded any provision of the MOU that requires the expenditure of funds, for purposes of the provisions of Section 3 of Chapter 1 that require the state employer and the employee organization to meet and confer to renegotiate the affected provisions if the funds therefor are not appropriated, or of Section 3517.7, which allows either party to reopen negotiations on all or part of the MOU if the Legislature does not fully fund the provisions. In other words, there is no explicit triggering mechanism that indicates when or to what extent the Legislature has not fully funded the provisions of the memorandum. As indicated above, we think that one such mechanism could consist of control language in the Budget Act.

In this connection, in the recent case of *White v. Davis* (2003) 30 Cal.4th 528, at pages 572 and 573, the court, in holding that a multiyear MOU does not constitute a continuing appropriation, made repeated reference to language in Section 3517.6 relating to the requirement of approval of the provisions of an MOU that require the expenditure of funds "in the annual Budget Act." In our opinion, those statements suggest that, in the case of a multiyear MOU, the failure to fully fund the MOU during one of the years could be manifested by the Legislature's actions as contained in the annual Budget Act. Section 4 of Chapter 1 authorizes "the provisions of any memorandum of understanding that require the expenditure of funds [to] become effective even if the provisions ... are approved by the Legislature in legislation other than the annual Budget Act." We think this provision was intended primarily to allow the Legislature to initially "approve" provisions such as

those contained in the MOU in question in separate legislation such as Chapter 1 rather than in the annual Budget Act. However, in addition, even though the implication in the existing statutes is that the Legislature must provide any funding for any MOU in the annual Budget Act, we think that the Legislature may make the necessary appropriation in separate legislation, because, as previously indicated, the acts of one legislative body cannot limit or restrict its own power or that of subsequent Legislatures by enacting legislation, and the act of one Legislature cannot bind its successors (*City and County of San Francisco v. Cooper*, supra, at p. 929; *In re Collie*, supra, at p. 398; *County Mobilehome Positive Action Com., Inc. v. County of San Diego*, supra, at p. 734).

However, absent the enactment of legislation specifically appropriating the necessary funds, in our opinion Section 3 of Chapter 1, when read in conjunction with Sections 3517.6 and 3517.7, would require the parties to meet and confer regarding any unfunded provisions and allow the parties to renegotiate any other provisions of the MOU.<sup>5</sup> Consequently, the appropriation of moneys to fully fund the provisions of a multiyear MOU, or a specification that such funding will not be provided for a fiscal year, may be set forth in the Budget Act or other statutory enactment. Of course, in our opinion, nothing would prevent the parties to an MOU, by mutual agreement, from reopening negotiations at any time prior to the enactment of the annual Budget Act in anticipation of the possible failure of the Legislature to provide full funding for the MOU (see Sec. 3517).

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<sup>5</sup> Where an MOU has expired, the parties are required to continue to give effect to the provisions of the expired agreement while negotiations continue, and if the parties reach an impasse in the negotiations for a new MOU, the state employer may present and the Legislature may approve the employer's last, best, and final offer (Sec. 3517.8). However, in our opinion a court would not characterize a multiyear MOU that requires an appropriation in order to effectuate certain of its provisions as having "expired" when that appropriation is not enacted for one of the years in which the MOU is in effect.

In summary, the Dills Act, and uncodified provisions of Chapter 1 of the Statutes of 2002 approving specific MOU provisions relative to State Bargaining Unit 6, require that any provisions of the MOU that require the expenditure of funds be approved by the Legislature before they become effective. In the case of a multiyear MOU, this approval must, in effect, be renewed annually in the form of an appropriation in the annual Budget Act or other enacted legislation. In our opinion, if a specific appropriation is not made for those provisions in the annual Budget Act or other legislation, the parties are required to meet and confer to renegotiate any affected provisions and may reopen negotiations on any other part of the MOU. The parties may also, by mutual agreement, reopen negotiations on any provision of the MOU prior to the enactment of the annual Budget Act, in anticipation of any proposed action or inaction by the Legislature.

Therefore, we conclude that the parties to the memorandum of understanding between the state employer and State Bargaining Unit 6 that was approved by Senate Bill No. 65 of the 2001-02 Regular Session (Chapter 1 of the Statutes of 2002) would be required to renegotiate the affected provisions that require the expenditure of funds if the Legislature

does not provide sufficient funding to implement those provisions in the Budget Act of 2004 or other legislation.

Very truly yours,

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**BED:jdg**